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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-364

No. COA21-320

Filed 17 May 2022

Cabarrus County, No. 17 CVS 1131

TONY RAY SIMMONS, JR., Plaintiff,

v.

JOHN LEE WILES, Defendant.

Appeal by Defendant from order entered 26 February 2021 by Judge William A. Long in Cabarrus County Superior Court. Heard in the Court of Appeals 8 February 2022.

Law Offices of L.T. Baker, P.A., by Lucas T. Baker, for Plaintiff-Appellee.

Arnold & Smith, PLLC, by Paul A. Tharp, for Defendant-Appellant.

INMAN, Judge.

¶ 1 This is the second appeal arising from a shooting in broad daylight in a parking lot to settle a grudge. Defendant-Appellant John Lee Wiles ("Mr. Wiles") argues the trial court erred in denying his requested relief from judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60 (2021). After careful review, we affirm the trial court's order.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 2 Mr. Wiles and Plaintiff-Appellee Tony Ray Simmons ("Mr. Simmons") got into a physical confrontation in the parking lot of a local hardware store on 19 September 2009, culminating in Mr. Wiles shooting Mr. Simmons in the abdomen. Criminal charges were never brought against Mr. Wiles, but in 2012, Mr. Simmons sued him for common law battery, requesting compensatory and punitive damages. The facts alleged in that action are described in detail in our prior opinion, *Simmons v. Wiles*, 271 N.C. App. 665, 845 S.E.2d 112 (2020).

¶ 3 Mr. Wiles answered Mr. Simmons' complaint, denying liability and the material claims thereof, and asserting defense of self and defense of his girlfriend.

¶ 4 Mr. Simmons voluntarily dismissed the complaint in November 2014 pursuant to North Carolina Rule of Civil Procedure 41(a), and then filed a second complaint in November 2015, alleging identical facts. Mr. Wiles answered the second complaint just as he had the first.

¶ 5 The case came on for trial on 17 January 2017 in Cabarrus County Superior Court. That same day, the court entered a consent order dismissing the action without prejudice to Mr. Simmons refiling it within 90 days. Counsel for the parties signed the consent order and indicated they intended to pursue a settlement agreement during that period.

¶ 6 On 13 April 2017, Mr. Simmons brought a third action against Mr. Wiles. The third complaint altered the factual allegations from those asserted in the first two complaints.[1] Mr. Wiles answered the third complaint just as he had the first two.

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[1] Mr. Simmons' first and second complaints alleged:

> 10. Upon information and belief, as Plaintiff drove his vehicle through the parking toward the Northern exit, Defendant exited his vehicle and began throwing objects at Plaintiff's truck.
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> 11. After noting the objects hitting his truck, Plaintiff stopped his truck, got out, and obtained a metal bar which he carried at his side, pointed downward toward the ground, and then began walking around the front of his truck toward the Defendant. Plaintiff intended to have further words with the Defendant, and carried the metal bar with him such that it could be used for his defense in the event of a physical attack by the Defendant.

Mr. Simmons' third complaint alleged:

> 9. As Plaintiff drove his vehicle through the parking toward the northern exit after making the U-turn, he heard a sound which sounded like objects or a chain striking the passenger side of his pickup truck or trailer which he was towing.
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> 10. After noting the aforementioned sound, Plaintiff stopped his truck, got out, and obtained a metal breaker bar which he had just purchased from Northern Tool from the storage bin of his trailer, planning to inspect and, if necessary, tighten the chains on the passenger side of the trailer attached to his truck. The breaker bar would be needed to tighten the chains if they were loose.

¶ 7 One week before Mr. Simmons' third action came on for trial, Mr. Simmons' counsel wrote a letter to defense counsel warning that if defense counsel introduced the first or second complaints in evidence for impeachment purposes, Mr. Simmons' counsel would be required to be a witness as to the two complaints and would have to withdraw from representing Mr. Simmons because of this conflict of interest. As a result, the trial would have to be postponed. Mr. Wiles' counsel agreed not to use the earlier complaints for any purpose in the trial so that the case would be able to move forward. Counsel for Mr. Simmons and Mr. Wiles entered into a "Consent Order on Final Pre-Trial Conference" providing, among other things, that the earlier complaints would not be admitted in evidence for any purpose.

¶ 8 The case came on for trial before a jury in Cabarrus County Superior Court on 17 December 2018. At the close of Mr. Simmons' evidence, the trial court entered a directed verdict in favor of Mr. Simmons on his common law battery claim, rejecting Mr. Wiles' defenses. The jury heard evidence of Mr. Simmons' damages and returned a verdict on 21 January 2019, awarding him $1,000,000 in compensatory damages and $2,000,000 in punitive damages. The trial court entered judgment on 23 January

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11. When Plaintiff rounded the front of his truck, the Defendant was already outside of his vehicle, where he proceeded to shout and fuss at the Plaintiff. Defendant then suddenly went to the drivers [sic] side of his vehicle, retrieved a pistol from inside the vehicle and shot the Plaintiff.

2019, in a 10-page, single-spaced order describing in detail the testimony presented at trial and the trial court's opinion that the jury's verdict was supported by clear and convincing evidence.

¶ 9 On 4 February 2019, Mr. Wiles filed a motion for judgment notwithstanding the verdict along with a motion for a new trial. Mr. Simmons also filed a motion to recover costs. The trial court heard the motions, and on 22 April 2019, entered a final judgment on the jury's verdict, which also granted Mr. Simmons' motion for costs and denied Mr. Wiles' post-trial motions.

¶ 10 Mr. Wiles appealed the judgment to this Court on 20 May 2019. He later moved to add the first and second complaints into the record on appeal. That motion was denied. We held the trial court did not err in granting Mr. Simmons' motion for directed verdict for his battery claim, in awarding punitive damages to Mr. Simmons, or in denying Mr. Wiles' post-trial motions. *Simmons*, 271 N.C. App. at 666, 845 S.E.2d at 114-15. Mr. Wiles then sought *en banc* reconsideration in this Court, asking for a writ of *supersedeas* and temporary stay while his motion was pending. We denied his motion on 6 July 2020. *Id.* Mr. Wiles petitioned the Supreme Court for discretionary review and the Supreme Court denied his petition on 15 December 2020.

¶ 11 While Mr. Wiles' *en banc* motion was still pending, he filed a petition for Chapter 11 bankruptcy and the United States Bankruptcy Court of the Eastern

District of North Carolina confirmed Mr. Wiles' reorganization plan on 15 June 2020. The reorganization plan provided that Mr. Wiles pay $1,000,000 to Mr. Simmons within 30 days of termination of the "State Court Litigation." The plan defined "State Court Litigation" as the civil action for battery and any subsequent proceedings or trial in such litigation.

¶ 12 On 11 January 2021, Mr. Wiles filed a motion pursuant to Rule 60(b) with the trial court, contending that both the judgment entered on 23 January 2019, which entered a directed verdict in Mr. Simmons' favor and awarded him damages, and the judgment entered 22 April 2019, which granted Mr. Simmons' motion for costs and denied Mr. Wiles' post-trial motions, were void because the trial court lacked subject-matter and personal jurisdiction by operation of *res judicata*, Rule 41 of our Rules of Civil Procedure, and the statute of limitations. Mr. Wiles contended that his counsel had entered into the agreement with Mr. Simmons' counsel in January 2017 to file a dismissal without prejudice without Mr. Wiles' knowledge or consent. He further contended that his counsel's agreement not to use the first two complaints filed by Mr. Simmons in the trial was made without his consent and was against his best interest.

¶ 13 The trial court denied Mr. Wiles' motion and Mr. Wiles filed timely notice of appeal. With his appeal, Mr. Wiles has filed a petition for writ of certiorari in the event his appeal is defective.

II. ANALYSIS

A. Appellate Jurisdiction

¶ 14 As a preliminary matter, and as Mr. Simmons concedes, Mr. Wiles' petition for writ of certiorari is moot because his appeal was properly preserved. The trial court's order denying the Rule 60 motions was a final judgment, affording Mr. Wiles "the right to prosecute an appeal," and Mr. Wiles' notice of appeal was timely. *See* N.C. R. App. P. 21(a) (2021) ("The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]").

B. Discussion

¶ 15 Mr. Wiles contends the trial court erred in denying his Rule 60(b)(4) and Rule 60(b)(6) motions. We disagree.

1. Standard of Review

¶ 16 We review a trial court's decision to deny a Rule 60(b) motion for abuse of discretion. *Royal v. Hartle*, 145 N.C. App. 181, 182, 551 S.E.2d 168, 170 (2001). In conducting this limited review, we can reverse the trial court's decision only upon a showing that the decision is manifestly unsupported by reason. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Findings of fact from the trial court are

binding on this Court if they are supported by competent evidence. *Royal*, 145 N.C. App. at 182, 551 S.E.2d at 170.

2. Rule 60(b)(4)

¶ 17 North Carolina Rule of Civil Procedure 60(b) provides avenues by which "on motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding." § 1A-1, Rule 60(b). Subsection (b)(4) ensures litigants relief from a judgment that is void. *Id.*, Rule 60(b)(4). A judgment is void when the trial court lacked jurisdiction over the parties or subject matter or otherwise lacked authority to render the judgment. *Royal*, 145 N.C. App. at 183, 551 S.E.2d at 170.

¶ 18 Mr. Wiles argues his counsel did not have his permission to enter into the consent order allowing Mr. Simmons to dismiss the civil action a second time without prejudice to refiling the action a third time within 90 days, so the consent order is invalid. Mr. Wiles claims: (1) his counsel did not consult with him about the consent order; (2) his counsel did not advise him of the two-dismissal rule provided in Rule 41; and (3) Mr. Simmons presented no evidence that Mr. Wiles possessed an understanding of the pleadings and law.

¶ 19 We presume that an attorney is authorized to act for his or her client when entering into a consent order on the client's behalf. *See Gillikin v. Pierce*, 98 N.C. App. 484, 488, 391 S.E.2d 198, 200 (1990). "While Rule 41(a) requires the consent of

the *parties* to the litigation, there is a presumption that an attorney has authority to act for his client and one challenging the attorney's actions as being unauthorized has the burden of rebutting the presumption." *Id.* (emphasis in original). Mr. Wiles has failed to rebut this presumption.

¶ 20 Mr. Wiles introduced an email exchange between his and Mr. Simmons' trial counsel to demonstrate that his trial attorney agreed not to use the first two complaints to "get the case over with before he took the bench." Mr. Wiles also brought a malpractice claim against his trial counsel in his ongoing bankruptcy proceeding and offered this pending claim as evidence of his lack of consent. The trial court considered this evidence, along with the affidavit Mr. Wiles submitted, and concluded it did not demonstrate Mr. Wiles' trial counsel lacked authority to enter into a consent order on his behalf.

¶ 21 Mr. Wiles directs us to no additional evidence on appeal. We cannot hold that the trial court's determination was a result of an unreasoned decision. *See Royal*, 145 N.C. App. at 181, 551 S.E.2d at 169.

¶ 22 Next, Mr. Wiles argues that the dismissal of Mr. Simmons' second action on 17 January 2017 constituted a final judgment on the merits because although it was styled as a consent order under Rule 41(b), it was in fact a voluntary dismissal under Rule 41(a). Rule 41(b), which governs the effect of *involuntary* dismissals, provides:

> Unless the court in its order for dismissal otherwise

> specifies, a dismissal under this section and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication upon the merits.

N.C. Gen. Stat. § 1A-1, Rule 41(b) (2021). But Rule 41(b) does not govern consent orders; Rule 41(a) provides for both dismissals by a plaintiff *and* dismissals by stipulation: "an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action," without prejudice unless otherwise stated in the dismissal order. *Id.*, Rule 41(a).

¶ 23 Finally, Mr. Wiles argues that the two-dismissal rule set forth in Rule 41(a) bars Mr. Simmons' third claim. "The two-dismissal rule, however, applies only when the plaintiff has twice dismissed *an action* based on or including the same claim." *Hopkins v. Ciba-Geigy Corp.*, 111 N.C. App. 179, 182, 432 S.E.2d 142, 144 (1993) (emphasis in original) (citing Rule 41(a)(1)). A plaintiff's first voluntary dismissal of his or her own claim against one defendant does not constitute an adjudication on the merits, as it is a dismissal without prejudice. *Id.* If a plaintiff brings a second action based on the same factual allegations, and the plaintiff voluntarily dismisses the action again, it will be considered an adjudication on the merits, barring a third action. *Id.* There was no second voluntary dismissal in this case. Mr. Simmons

voluntarily dismissed his first action. Mr. Simmons' second action was dismissed by consent order without prejudice to him refiling the action within 90 days.

¶ 24 A consent order that follows a voluntary dismissal by the plaintiff will not trigger the two-dismissal rule. *See North Carolina R. Co. v. Ferguson Bldrs. Supply, Inc.*, 103 N.C. App. 768, 773, 407 S.E.2d 296, 299 (1991) ("[T]he second dismissal rule does not apply to make voluntary dismissals by stipulation or by order of court 'on the merits,' even when they follow a previously filed notice of voluntary dismissal.").

¶ 25 The consent order in Mr. Simmons' second action was valid and did not bar Mr. Simmons' third action.

3. Rule 60(b)(6)

¶ 26 Rule 60(b)(6) of our Rules of Civil Procedure provides: "on motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) Any other reason justifying relief from the operation of the judgment." § 1A-1, Rule 60(b)(6). To qualify for relief under Rule 60(b)(6), the movant must show: (1) extraordinary circumstances exist, (2) justice demands a setting aside of the judgment, and (3) the movant has a meritorious defense. *Royal*, 145 N.C. App. at 184, 551 S.E.2d at 171 (citations omitted). "Procedural errors made by a party's counsel may be a basis for setting aside a judgment under Rule 60(b)(6) if the errors amount to gross negligence." *Id.* at 185, 551 S.E.2d at 171 (citation omitted).

¶ 27 Mr. Wiles argues the asserted procedural errors discussed above along with his counsel's unauthorized stipulation amount to extraordinary circumstances such that justice demands setting aside the judgments, and that he has meritorious defenses. The trial court concluded Mr. Wiles did not satisfy the three-part test to justify relief. We agree with the trial court.

¶ 28 In *Royal v. Hartle*, we affirmed the trial court's order refusing to vacate a consent order under Rules 60(b)(4) and 60(b)(6). 145 N.C. App. at 182-184, 551 S.E.2d at 170-72. The defendants argued the trial court should have determined they did not authorize their attorney to enter into the consent order and their attorney acted with gross negligence in entering the agreement. *Id.* at 183-85, 551 S.E.2d at 170-72. To support their motion under Rule 60(b)(6), the defendants pointed out that the consent order granted the plaintiff a utility easement which she had not asked for in her initial complaint. *Id.* at 185, 551 S.E.2d at 172. This Court affirmed the trial court's decision not to vacate the consent judgment under Rule 60(b). *Id.*

¶ 29 Mr. Wiles argues that extraordinary circumstances exist to justify relief here because he did not authorize his attorney to enter into the consent order dismissing Mr. Simmons' second suit and his trial counsel was grossly negligent in doing so. But the trial court found as follows:

> 23. The parties' stipulations set forth in the "Consent Order on Final Pre-Trial Conference" filed 17 December 2018 reflect that counsel of record considered many matters and

> were able to find mutual ground to ensure that the attorneys could try the case effectively on the merits in the least amount of time possible and with due regard to the convenience of witnesses. There is nothing so irregular about the parties' stipulations appearing on the face of the document which would amount to a procedural blunder. To the contrary, the face of the document reflects the standard of professionalism to which attorneys should adhere in expediting trials to the greatest extent possible.
>
> 24. Defendant's trial counsel, Judge Grossman, aggressively litigated on Defendant's behalf.
>
> 25. The evidence of Defendant's liability, per the Court's written opinion pursuant to N.C. Gen. Stat. § 1D-50 was strong, clear and convincing, to justify the verdict.

Because competent evidence in the record supports the trial court's findings that Mr. Wiles' counsel committed no procedural blunder and instead conformed to professional standards of practice, and that Mr. Wiles' liability was proven by "strong, clear and convincing evidence," we cannot disturb these findings on appeal. *See id.*

¶ 30 We hold the trial court did not abuse its discretion in denying Mr. Wiles' motion to set aside the judgment under either Rule 60(b)(4) or Rule 60(b)(6).

III. CONCLUSION

¶ 31 For the reasons set forth above, we deny Mr. Wiles' petition for writ of certiorari as moot and affirm the order of the trial court.

AFFIRMED.

Chief Judge STROUD and Judge JACKSON concur.

Report per Rule 30(e).